DON E. JONZ

IBLA 70-648 Decided March 20, 1972

Appeal from decision (F-033935) by Alaska state office, Bureau of Land Management, denying request for extension of time, rejecting application to purchase and cancelling trade and manufacturing site claim.

Set aside in part and remanded.

Alaska: Trade and Manufacturing Sites

The time for improving a trade and manufacturing site and developing productive industry thereon cannot be extended beyond the 5 years provided in 43 U.S.C. § 687a-1 (1970).

Alaska: Trade and Manufacturing Sites--Rules of Practice: Evidence--Contests and Protests: Generally

A field examination report of a trade and manufacturing site claim is not evidence on which the final action of cancellation may be taken, until such time as the pertinent facts are admitted by the applicant or the report is admitted into evidence at a hearing initiated by a contest complaint.

Alaska: Trade and Manufacturing Sites--Hearings

A trade or manufacturing site claim is not to be cancelled for defects not appearing on the face of the record without giving the claimant an opportunity to be heard. 43 U.S.C. § 687a (1970).

Alaska: Trade and Manufacturing Sites--Hearings

On appeal from the rejection of a trade and manufacturing site application, the case will be remanded for hearing when it appears that a hearing is necessary to determine whether the applicant has occupied the site for the purposes of trade, manufacture or other productive industry and has established on the land improvements needed in the prosecution of such activities. 43 U.S.C. § 687a (1970).

APPEARANCES: Bixler Whiting, for the appellant.

OPINION BY MR. FISHMAN

Don Jonz has appealed from a decision (F-033935) of the Alaska state office, Bureau of Land Management, dated June 9, 1970, which denied his request for extension of time, rejected his application to purchase a trade and manufacturing site and cancelled his claim under 43 U.S.C. § 687a et seq. (1970). The application was rejected, the claim cancelled and the application for extension of time denied for the reasons that: (1) the applicant did not, at the time of filing his application to purchase, have a business in operation on the land covered by his claim; and (2) the statutory life of the claim had expired, and there are no provisions for an extension of time within which to comply with the law. 43 CFR § 2213.1-2(c) (1970), renumbered 43 CFR § 2562.3(c) (1972).

Appellant requests a hearing and asserts (a) the evidence submitted showed that there was a business located upon the land at the time of the application to purchase; and (b) appellant made a good and bona fide showing for extension of time for proving his application, and the extension should have been granted.

Appellant's application to purchase an 80-acre tract of unsurveyed land was filed April 7, 1970, under Section 10 of the Act of May 14, 1898, 30 Stat. 413 as amended, 43 U.S.C. § 687a (1970). Section 687a provides for the sale of not more than 80 acres of land in Alaska to:

> Any citizen of the United States . . . in the possession of and occupying public lands . . . in good faith for the purposes of trade, manufacture, or other productive industry . . . upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry . . . .

Regarding appellant's request for an extension to further improve the property and develop his business, 43 U.S.C. § 687a-1 (1970) provides in part:

> . . . Application to purchase claims, along with the required proof or showing, must be filed within five years after the filing of the notice of claim under this section.

There is no provision for extending the time for the construction of improvements or for developing a business; therefore the request for an extension was properly denied. 43 CFR § 2213.1-2(c) (1970), now 43 CFR § 2562.3(c) (1972).

The issue herein is whether the appellant has made a prima facie showing that within the crucial five year period he has engaged in

such a commercial operation on the land applied for as will satisfy the requirements of the trade and manufacturing site law. 43 U.S.C. § 687a (1970). To do so he must comply with the Department regulation 43 CFR § 2213.1-2(d)(1) (1970), renumbered 43 CFR § 2562.3(d) (1972):

> (d) Contents. The application to enter must show:
>
> (1) That the land is actually used and occupied for the purpose of trade, manufacture or other productive industry when it was first so occupied, the character and value of the improvements thereon and the nature of the trade, business or productive industry conducted thereon and that it embraces the applicant's improvements and is needed in the prosecution of the enterprise. A site for a prospective business cannot be acquired under section 10 of the act of May 14, 1898. . . .

Appellant has alleged that he has met the requirements outlined, supra, and has requested that, if necessary, a hearing be held to permit him to present argument and evidence. In the application to purchase filed April 6, 1970, appellant together with Francis J. Connor and attorney Bixler Whiting affirm that:

> The land is actually used and occupied for the purpose of trade, manufacture, or other productive industry. The nature of the commercial operation . . . conducted on the land is . . . warehousing, yard storage, feeding and housing of personnel for oil oriented service and supply companies.

While the designation of a site for a prospective business does not satisfy the requirements of statute or regulation, it is not necessary that the enterprise be in fully completed form or that it actually prove to be profitable. The Department stated in James E. Allen, A-30085 (February 23, 1965):

> We do not mean to imply that a modest operation or even an unprofitable one would necessarily fail to qualify under the trade and manufacturing site law. That law does not require the existence of a full-blown enterprise before a patent can issue. We do not believe, however, that the law can be interpreted to encompass an operation so infrequently used by customers and so unproductive of gross receipts as the business operated by the appellant here during the life of his claim.

Appellant has failed to furnish much of the information requested by the Bureau state office in its show cause notice of April 27, 1970. The information which was furnished however, together with the allegations in appellant's original proof, constituted a prima facie showing that a use and occupation of at least a portion of the land had passed the prospective business stage and that a business did exist. The field examination report on file herein indicates that this showing may not be correct. Unless the pertinent facts in the field report are admitted by the applicant or the field report is admitted into evidence at a hearing, the report is not evidence on which the final action of cancellation may be taken. See Claude E. Crumb, 62 I.D. 99, 100-01 (1955). The report is however, a proper basis for charges, notice, and a hearing.

It is well settled that a claimant to public land, who has done all that is required under the law to perfect his claim, acquires rights against the Government and that his right to a legal title is to be determined as of that time. This rule is based upon the theory that by virtue of his compliance with the requirements he has an equitable title to the land; in equity it is his and the Government holds it in trust for him. Payne v. New Mexico, 255 U.S. 367, 371 (1921). See also Solicitor's Opinion, 57 I.D. 547, 551 (1942).

An entry is not to be canceled for defects not appearing on the face of the record without giving the entryman an opportunity to be heard. Johnnie E. Whitted, Bill Smith, 61 I.D. 172, 174 (1953). In such circumstances where the right is believed to be subject to cancellation, the proper procedure is to initiate a contest under 43 CFR § 4.451 (1972). Cf. Eloydmae Zwang et al., A-30201 (February 3, 1965).

As explained in Kenai Power Corporation, 2 IBLA 56, 59 (1971):

> If it were necessary in this case to rely on facts inconsistent with appellant's purchase application or contrary to its assertions on appeal, appellant would be afforded the opportunity to present evidence at a hearing to substantiate its claims as to the extent of improvement and use of the land and its need for it in connection with a commercial enterprise. Clayton E. Racca, 72 I.D. 239 (1965).

Herschel E. Crutchfield, A-30876 (September 30, 1968), in which a hearing was not granted, is distinguishable in that the applicant therein did not allege facts which, if proved, would have entitled him to the relief sought.

It will be noted that the decision appealed from does not set forth a specific finding on whether or not appellant has complied with the requirement of submitting "proof the said area embraces improvements of the claimant." Appellant and his witnesses have all affirmed improvements of $20,000. At the hearing, the appellant will have the burden of presenting the evidence necessary to establish his

assertion that he has met the purchase requirements of the law. It will be necessary for him to substantiate specifically the various activities and improvements that he has performed and to show the exact nature of the operation. Failure of the appellant to meet this burden will result in rejection of his application. Jay Frederick Cornell, 4 IBLA 11 (1971); John H. Gilbert, A-30390 (August 19, 1965). A person seeking to establish a claim to public land has the burden of showing his right thereto. Van Ragsdale, A-21175 (July 13, 1938).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision rejecting the application to purchase and cancelling the claim is set aside, and the case is remanded for the initiation of a contest.

Frederick Fishman, Member

We concur:

Anne Poindexter Lewis, Member

Joseph W. Goss, Member